THE INTERSTATE COMMERCE CLAUSE AND STATE CONTROL OF FOREIGN CORPORATIONS

"THE Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[1]

" * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof."[2]

Only one possessed of prophetic vision would dare to state the extent of the power contained in these clauses of the constitution, to say nothing of the subjects or persons to which it may be applied. There can be little doubt that the framers of the constitution had not the remotest conception of the enormous growth and expansion of commerce among the states witnessed at the present day. The railroad, the telegraph and the telephone, those potent agencies in the development of commerce were not only unknown, but were beyond the wildest dreams of the greatest enthusiast. Corporations were practically unknown except for a few banks, municipalities and charitable or ecclesiastical bodies. A corporation with millions of capital operating railroads in one state, mines in another, ore docks in another, and blast furnaces in another, having a fleet of vessels traversing thousands of miles on inland seas and selling its products over the entire world, was unthought of and in the then state of the law, inconceivable. These men were cognizant, however, of the petty jealousies, enmities and conflicts existing between the several colonies, and realized undoubtedly to the fullest, the necessity for a strong union; the necessity of restraining these jealousies and enmities, as being weak points at which a foreign enemy might enter. It is curious to note that in the discussions contained in "The Federalist," the effects of the unrestrained rivalry of the colonies and the competitions of commerce are discussed not so much with reference to the relation between the citizens of the several colonies as traders, as from the standpoint of its being a cause of friction, of war, as an element of weakness of which a foreign power might in many ways take advantage.

It is worth while to quote from these essays, because the language used is so applicable to present day conditions, arising from the expansion of interstate trade and the carrying on of this trade by

[1] Constitution, Art. 1, Sec. 8, Paragraph 3.

[2] Art. 1, Sec. 8, Paragraph 18.

large aggregations of capital in the form of corporations chartered by the several states and territories.

Hamilton, writing concerning dangers from war between the states[3] and answering the claim that:

"The genius of republics * * * is pacific; and the spirit of commerce has a tendency to soften the manners of men, that:

"Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest and will cultivate a spirit of mutual amity and concord." Said:

"Has it not * * * invariably been found, that momentary passions, and immediate interests, have a more active and imperious control over human conduct, than general or remote considerations of policy, utility, or justice? * * * Has commerce hitherto done anything more than change the objects of war? Is not the love of wealth as domineering and enterprising a passion as that of power or glory? Have there not been as many wars founded upon commercial motives, since that has become the prevailing system of nations, as were before occasioned by the cupidity of territory or dominion? Has not the spirit of commerce in many instances, administered new incentives to the appetite both for the one and for the other?"

And again writing on the same subject:[4]

"The competitions of commerce would be another fruitful source of contention * * * Each state, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences and exclusions which would beget discontent. * * * The opportunities, which some states would have of rendering others tributary to them, by commercial regulations, would be impatiently submitted to by the tributary states. The relative situation of New York, Connecticut, and New Jersey would afford an example of this kind."

In this last sentence, Hamilton was making use of a situation well understood by the citizens of the three states named. The jealousies and oppressions created by the retaliatory commercial relations of the three colonies mentioned, were matters fresh in the minds of the people addressed; New Jersey especially feeling oppressed from the fact that importations into the state must come through ports controlled by either New York or by Pennsylvania, as early as 1778 presented to Congress a memorial asking relief.

Speaking directly on the commerce clause as finally adopted in the

[3] Federalist No. 6.

[4] Federalist No. 7.

constitution, Madison in one of his essays contributed to "The Federalist" (No. 42), said:

"The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. * * * A very material object of this power was the relief of the states which import and export through other states, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen that ways would be found out, to load the articles of export and import during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience * * * by that and a common knowledge of human affairs, that it would nourish unceasing animosities and not improbably terminate in serious interruptions of the public tranquility."

And commenting upon the passions which would be aroused by desire for an unfair advantage, he said:

"But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals by the clamors of an impatient avidity for immediate and immoderate gain."

Accepting these views of Madison as a fair expression of the motives which actuated the convention in adopting this clause, no one can examine the course of the opinions of the Federal Supreme Court, construing it without being struck with the broad-mindedness and far-seeing intelligence of the judges to whom this power of construction has been confided; and while the Constitution and its principles have all the time remained the same, we cannot help being impressed with the manner in which it has been made applicable to conditions and circumstances which at the time the clause was formulated no one would have said were within its meaning or its words.

In *Gibbons* v. *Ogden*[5], Chief Justice Marshall gave a definition of commerce which has never been limited or departed from and under which the rights of regulations have expanded to meet present day conditions. He said (p. 190):

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse." And defining the power conferred upon Congress (p. 196):

"It is the power to regulate; that is to prescribe the rule by which commerce is to be governed. This power, like all others vested in

[5] 9 Wheat. 1, 190-197.

congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution."

In declaring that interstate commerce included the transmission of telegrams, Mr. CHIEF JUSTICE WAITE said in *Pensacola Telegraph Co.* v. *Western Union, etc., Co.*[6]:

"The powers thus granted (by the commerce clause) are not confined to the instrumentalities of commerce, * * * known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they related, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation." (p. 10):

"The government of the United States within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all."

As bridges have become channels of communication between states separated by navigable streams, they have been subjected to regulation as a necessary instrument of interstate commerce[7], and if necessary Congress may create a corporation for the purpose of controlling and operating such a bridge. In *Luxton* v. *North River Bridge Co.*[8], the act of congress in this respect was justified as an appropriate means of executing the powers conferred by the commerce clause. And in the opinion, quoting from an earlier case[9] wherein the power of creating a corporation for the construction of a railroad was justified under the commerce clause, it was said (p. 533):

"This power in former times was exercised to a very limited

[6] 96 U. S., 1, 9, 10.
[7] Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204.
[8] 153 U. S. 525.
[9] California *v.* Pacific Railroad, 127 U. S. 1.

extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water and many of our statesmen entertained doubts as to the existence of power to establish ways of communication by land. But since in consequence of the expansion of the country, the multiplication of its products and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed. and led to the conclusion that Congress has plenary power over the whole subject."

And more recently the Supreme Court has sustained the validity of an act of Congress absolutely prohibiting the transportation of lottery tickets, which were declared to be subjects of traffic and their carriage from one state to another as interstate commerce.[10] In the Lottery Case, Mr. JUSTICE HARLAN, after reviewing many of the earlier cases, said (p. 352):

"They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it, and that in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed."

That the rivalries and competitions of commerce are still a fruitful source of contention; that individuals, and through them states, are still controlled by momentary passions and immediate interests; that the mild voice of reason is still drowned by an impatient avidity for immediate and immoderate gain, is apparent from even the most cursory examination of the cases that have come before the courts; although the highways and instruments of commerce are no longer limited by state lines, merchants and manufacturers who seek to deal beyond their immediate localities or their own particular state, find themselves hampered by vexatious and discriminating limitations upon interstate commerce. If we may judge from the reported cases the motives which actuated the colonies in their

[10] Lottery Case, 188 U. S. 321.

enactments relating to trade between the different communities have been ever present, and are still as active as before the adoption of the Constitution. Indeed, they have only been restrained by the strong arm of the Federal Supreme Court in its enforcement of the commerce clause.

In *Robbins* v. *Shelby Taxing District*,[11] the State of Tennessee by statute proposed to tax, "All drummers and all persons not having a regular licensed house of business" in the taxing district,—the necessary effect of which was to levy a tax upon wholesale merchants and others having establishments outside of the state, but soliciting trade within the state.

In *Brennan* v. *Titusville*,[12] the city of Titusville, Pennsylvania, by an ordinance, required, "All persons canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise" to obtain a license and by a proviso excepted merchants or dealers residing and doing business in the city.

In *Caldwell* v. *North Carolina*,[13] the city of Greensboro, North Carolina, by a similar ordinance undertook to charge a license tax upon "Every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face" unless the business was carried on in connection with some other business for which a license had already been taken out and paid to the city.

In *Crutcher* v. *Kentucky*,[14] the state forbade the agent of an express company not incorporated under the laws of that state from carrying on business without first obtaining a license.

In *Welton* v. *State of Missouri*,[15] the state enacted a statute providing: "Whoever shall deal in the selling of patent or other medicines, goods, wares or merchandise * * * which are not the growth, product or manufacture of this state" should first obtain a license, no license being required for selling the products or manufactures of the state.

In *McCall* v. *California*,[16] the city of San Francisco under an ordinance taxing railroad agencies undertook to tax a solicitor of passenger traffic for a railway operating between Chicago and New York.

In *Kehrer* v. *Stewart*,[17] the State of Georgia by a statute imposed

[11] 120 U. S. 489.
[12] 153 U. S. 289.
[13] 187 U. S. 622.
[14] 141 U. S. 47.
[15] 91 U. S. 275.
[16] 136 U. S. 104.
[17] 197 U. S. 60.

a tax of $200 in each county where business was carried on, "Upon all agents of packing houses doing business in the state." There were no domestic packing houses so that, in fact, the enactment was levelled directly at the agents of Chicago packing houses.

Pennsylvania[18] undertook to prohibit the manufacture or sale of oleomargarine as an article of commerce, while the State of New Hampshire[19] undertook to prohibit the sale of oleomargarine unless it was colored pink.

Vexatious and annoying as are ordinances and statutory enactments of the character illustrated by the cases just cited, the statutes enacted by substantially all of the states and territories of the United States for the purpose of regulating and controlling foreign corporations within their respective boundaries, present even greater inequalities and discriminations.

The creation of large commercial corporations by merger, consolidation or original organization, and the fact that the natural persons controlling them have exercised the powers of these "fictitious, intangible and invisible beings," in a manner not in accord with the principles of the golden rule, has undoubtedly had much to do with this condition of things.

Theoretically, the purpose of these statutes has been to provide that foreign corporations shall have no greater privileges than domestic organizations; to compel foreign corporations to respond to liabilities arising at the place where their dealings were actually had, and to enable parties contracting with them to know in advance something of their responsibility, and the character of the corporate organization. Obviously this motive is of the highest character and founded upon well settled moral and legal principles. Actually, however, the manufacturer and merchant engaged in interstate commerce finds the statutes as well as the legal rules on which they are based used as a weapon to favor localities and local merchants, and imposing burdensome, oppressive and discriminating restrictions.

It is elementary that a corporation is a mere creature of the law and can make no contracts except such as are authorized by its charter and since the decision, *Bank of Augusta* v. *Earle*,[20] it has been the settled law,

"That a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of the law and by force of the law; and where that

[18] Schollenberger *v.* Pennsylvania, 171 U. S. 1.
[19] Collins *v.* New Hampshire, 171 U. S. 30.
[20] 13 Pet. 519, 588.

law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty."

In short, as to all states, except that of its creation, it is a foreign corporation. And in the same case it was determined (p. 592):

"That by the law of comity among nations, a corporation created by one sovereignty, is permitted to make contracts in another and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. * * * This comity is presumed from the silent acquiescence of the state."

These rules were perhaps more forcibly stated in *Paul* v. *Virginia*[21]:

"The recognition of its (the corporation's) existence even by other states, and the enforcement of its contracts made therein, depend purely on the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the corporation entirely; they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And under the doctrines of this case, it was determined that a corporation was not a citizen within the meaning of that clause of the Constitution providing that: "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." (Art. 4, Sec. 2).

And in *Blake* v. *McClung*,[22] it was ruled that while the corporation was a "person" within the meaning of that clause of the Fourteenth Amendment declaring that no state "Shall deprive any person of life, liberty or property without due process of law," that a foreign corporation which had not complied with the laws of the state so as to subject it to process from its courts was not within the meaning of that portion of the same amendment declaring that no state shall: "Deny to any person within its jurisdiction the equal protection of the laws," following *Pembina Mining Co.* v. *Pennsylvania*[23]. On this latter point, the court speaking through Mr. JUSTICE HARLAN, in the former case, said (p. 260):

[21] 8 Wall. 168, 181.
[22] 172 U. S. 239, 260.
[23] 125 U. S. 181, 189.

"That prohibition manifestly relates only to the denial by the state of equal protection to persons "within its jurisdiction." * * * Without attempting to state what is the full import of the words 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that state."

Under the authority of and sustained by these rulings, nearly every state and territory in the Union has enacted statutes purporting to regulate and determine the rights of foreign corporations to do business within their respective boundaries. It is impossible to harmonize these different statutes. While in the main they provide for filing copies of the Articles of Association, or other certificates relating to the incorporation, and showing the financial standing of the corporation; and require the appointment of agents within the state upon whom service of process may be had; and the payment of certain taxes or license fees,—yet in carrying out the details of these requirements, there is a hopeless conflict resulting in discrimination, and in some cases almost prohibitive burdens and restrictions.

When we consider the large amount of capital engaged in commercial affairs, and the extent of the interstate character of that business, and that this capital is exploited in the form of large corporations, we can appreciate the difficulties attending a harmonious application of the rules relating to interstate commerce transactions under the commerce clause of the Constitution, and those relating to the state control of foreign corporations. We have thus presented one of the greatest difficulties arising from the peculiarities of our system of government. Stated generally, and not attempting to notice apparent exceptions to the rules over the subject of interstate commerce, the Federal authority is supreme and absolute; over the right to control foreign corporations doing business within its boundaries, the state is equally supreme. To the courts is left the delicate duty of harmonizing these extremes. Happily, we are able to say that in the majority of instances, the courts have met this question with fidelity, with a desire for harmony in the operation of the rules, and in their decisions have exhibited broad and statesmanlike views, ever keeping before them the thought that the citizens and inhabitants of the several states and territories were all citizens and inhabitants of the United States. On the other hand, it must be said that much of the legislation has exhibited narrow views and a desire to benefit one state or vicinity at the expense of another, to give individual citizens or localities a special privilege or unfair

advantage; and unfortunately, we must add, courts have been found ready and willing upon specious and ingenious arguments to sustain enactments made to accomplish these purposes.

The usual penalties for a violation of these state regulations have been either a punishment of the officers or the agents representing the corporations, by a fine or imprisonment or both, or to refuse the corporation the use of the state courts to enforce its contracts made with citizens of the state. The penalty by way of a fine or imprisonment of agents has ordinarily proved ineffective, but the weapon of refusing the foreign corporation the use of the state courts to enforce its contracts has proven not only effective, but in many instances has been exercised as a means of interfering with or adding a burden to interstate commerce.

It is often an exceedingly difficult matter to determine whether a particular transaction shall be considered interstate commerce, or intrastate commerce, and the difficulty is enhanced by peculiarities in the wording of the statutes of the several states regulating the admission of foreign corporations.

The following cases drawn from tax cases as well as those involving statutes regulating the use of the state courts, illustrate these difficulties:

Kelly v. *Rhoads*[24]: The county authorities of Laramie County levied a tax on sheep which were being driven across the State of Wyoming from a point in Utah to a point in Nebraska, from which latter point they would be shipped to their final destination. In the agreed statement of facts it appeared that the sheep in driving were permitted to spread out at times about a quarter of a mile, and to graze over the land; that they traveled a distance of about nine miles a day, taking from five to six weeks to traverse the five hundred miles. It also appeared that it was not necessary for the purpose of shipping the sheep that they should be driven into the State of Wyoming; that the railroad over which they were shipped could have been reached from the point wherefrom the sheep were first driven by traveling a less distance than was necessary in traveling across the State of Wyoming. Applying the rule that property actually in transit between states is exempt from local taxation, the court held that the tax was illegally levied and was an interference with interstate commerce.

The case of *Kehrer* v. *Stewart*[25] presented a curious state of affairs. The State of Georgia levied a tax of $200 in each county where business was carried on, upon all agents of packing houses

[24] 188 U. S. 1.
[25] 197 U. S. 60.

doing business within that state. Nelson, Morris & Co., of Chicago, maintained a place of business in Atlanta, at which they sold their products at wholesale, employing several clerks and helpers in and about the business. They maintained no packing house within the State of Georgia, but took orders for meats which were transmitted to Chicago and there filled, the meats being shipped to Atlanta and distributed in pursuance of the orders. Certain other meats were also shipped from Chicago to Atlanta without previous sale or contract to sell; these were stored in the Atlanta house and were offered for sale to such customers as might desire them. The court ruled that as to such of the business as consisted in the shipping of goods to Atlanta to fill orders previously received, it was interstate commerce, and not subject to taxation, and so far as applied to this business, the tax was void. Upon the other branch of the case, the court said (p. 69):

"If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there refused the goods shipped and the only way of disposing of them was by sale at Atlanta, this might be held strictly incidental to an interstate business and in reality part of it, as we held in *Crutcher* v. *Kentucky,* 141 U. S., 47; but if the agent carried on a definite, though a minor part of the business in the state by the sales of meat there, he would not escape the payment of tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax."

In *Norfolk, etc., Railway Co.* v. *Pennsylvania,*[26] the state statute provided that no foreign corporation (with certain exceptions) which did not invest and use its capital in the state, should have an office in the state for the use of its officers, stockholders or employees, without first obtaining a license so to do and paying a certain license fee. The Railway Company maintained such an office without complying with the statute. It appeared that it was organized under the laws of Virginia and West Virginia in which states its main line and branches were wholly located, but by reason of certain traffic agreements it became a link in a through line of road, the business of which was to carry freight and passengers into and out of the State of Pennsylvania. It was held that the statute of Pennsylvania was an interference with interstate commerce.

The case of *Caldwell* v. *North Carolina,*[27] is also interesting. The city of Greensboro by an ordinance undertook to require the payment of a license tax upon the business of selling and delivering

[26] 136 U. S. 114.
[27] 187 U. S. 622.

pictures and picture frames when the same was conducted by non-residents. A Chicago company sent its agent to Greensboro, who solicited orders for the pictures and frames; these orders were sent to Chicago where they were filled; the pictures were shipped in one package and the frames in another addressed to the Chicago company at Greensboro, North Carolina. The agent obtained these packages, took them to a room in a hotel, broke the bulk and placed the pictures in the frames, delivered them and collected the purchase price. This was done without complying with the city ordinance. It was held that the transaction was interstate commerce and the tax was invalid.

In *Cooper Mfg. Co.* v. *Ferguson,*[28] the State of Colorado by its Constitution provided that no corporation should do business within the state without having one or more known places of business and an authorized agent at the same upon whom process might be served. And statutes were passed carrying this clause of the Constitution into effect. The plaintiff company was an Ohio corporation, which without complying with the statute had entered into a contract in the State of Colorado to sell defendant a steam engine and other machinery for which the defendant was to pay a certain stipulated price. Suit was brought on this contract and the defence was the failure to comply with the Colorado statutes. The opinion of the majority of the court is placed upon rather narrow grounds, holding that the statute and constitution did not apply to the doing of a single act of business, and it could not be said that a single act amounted to carrying on of business. It not appearing that the corporation was doing more than a single act, the statute did not apply. Mr. JUSTICE MATTHEWS and Mr. JUSTICE BLATCHFORD in a concurring opinion, plant themselves upon much stronger and higher ground, and referring to the transaction in question said (p. 736):

"That was commerce; and to prohibit it except upon conditions, is to regulate commerce between Colorado and Ohio which is within the exclusive province of Congress."

In *Diamond Glue Co.* v. *U. S. Glue Co.*[29] the Wisconsin statute relating to foreign corporations was in question. This statute, by the way, contains the peculiar provision that every contract of a corporation not complying with its terms should be wholly void in its behalf, but enforceable against it. Plaintiff company, an Illinois corporation, had entered into a contract to erect a manufacturing plant for the defendant and on its completion to manage the manu-

[28] 113 U. S. 727.
[29] 187 U. S. 611.

facturing and operate the plant for the defendant, supplying it with a superintendent for a certain period, and have the exclusive sale of its products. Suit being brought upon the contract, the defence was that it had not complied with the Wisconsin statute. The court thought that the portion of the contract relating to the operation of the business in Wisconsin was inseparably connected with the contemplated traffic that should go outside of the state, saying the foundation of a commerce outside of the state was doing business within it, and

"Therefore unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that in the working of a statute there is some tendency logically discernible to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made."

A recent Michigan case is along this line. In *Hastings Industrial Co.* v. *Moran*,[30] the plaintiff, an Illinois corporation, entered into a contract with defendant and others to construct and equip a canning factory. At the time it made the contract it had not complied with the statutes of this state relating to foreign corporations, but did so at a later date and before suit was brought, and this was held sufficient under this statute. All of the machinery and equipment were shipped into this state from other states and no part of the contract values were furnished within this state except the construction of the foundation and buildings, and placing of the machinery, amounting in all to about thirty per cent of the contract price. The plaintiff company did not maintain an office, warehouse, or general agent within the state. The court adhered to the rule laid down in *Coit* v. *Sutton*,[31] that the statute in question did not apply to cases where by the terms of the contract goods are sent to the purchaser from without the state, as that would be an interference with interstate commerce, but did say:

"It was necessary to purchase materials and employ men in Michigan to carry out this contract and clearly contemplated and included something more than interstate commerce."

In other words, drawing practical lines, the court has said that where thirty per cent of the contract value is obtained within the State of Michigan, it becomes a doing of business in the state and is not interstate commerce.

The Supreme Court of South Dakota in a recent decision has solved the problem by eliminating entirely the question of degree and practical lines. In *Iowa Falls Mfg. Co.* v. *Farrar*, decided in

[30] 13 *Detroit Legal News*, 131.
[31] 102 Mich. 325.

August, 1905,[32] it was a conceded fact that the transaction in question was interstate commerce, and an action on the contract in question was defended on the ground that the corporation had not complied with the law of South Dakota regulating foreign corporations. Following a Kansas case, the court ruled that the statute in question prohibiting suits without complying with the statute, was not an interference with interstate commerce. This was followed by the decision in *American Copying Co.* v. *Eureka Bazaar*,[33] where it was ruled, a failure to comply with the statute did not merely suspend the right of action but made the contract itself absolutely void and that no recovery could be had even though before suit the corporation had complied with the statute and filed its articles and appointed its agent.

Without undertaking to compare the statutes of the different states, it is enough to say that it is more difficult for the manufacturer and merchant doing an interstate business to keep himself advised of the details of the laws relating to foreign corporations, than it was for the trader of the early days to keep track of the value of colonial currency or the merchant of more recent times to know the value of "wildcat bank" bills. This conflict in the statutes and in the decisions of the courts construing them has had a harmful effect in many ways. Credits have been restricted and sometimes wholly withheld from fear of meeting a defence of some violation of the local statutes upon an attempt to enforce contracts, or payment for goods sold and delivered. A variety of ingenious methods of evading the statutes with more or less success has been evolved. I believe that manufacturers and merchants engaged in interstate commerce as a whole, would gladly comply with the laws of the different states if they were certain as to what would be required of them, if there was at least a tolerable uniformity in the requirements, and if these statutes were free from discrimination in favor of domestic corporations.

What is the remedy? Something can be done probably by continued and constant agitation for the enactment of uniform laws by the several states. Our "Negotiable Instruments" law is a notable instance of what can be accomplished by persistent effort. An intimation of what might be done by Congress towards producing uniformity of regulation affecting interstate commerce was made in *Robbins* v. *Shelby Taxing District*[34]. Mr. JUSTICE BRADLEY, speaking for the court, said:

[32] 104 N. W. Rep. 449.
[33] 108 N. W. Rep. 15.
[34] 120 U. S. 489, 498.

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interests of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."

This suggestion has been made in different forms in other cases. We have not far to look to discover that Congress in more than one instance has exercised this power of regulation. Among the instances may be cited the Railroad Act of 1866, authorizing continuous lines of transportation; the Interstate Commerce Act of 1887; the Sherman Anti-Trust Act of 1890; the Wilson Act (so called) of 1890, regulating the transportation of intoxicating liquors; the numerous acts regulating bridges and ferries over navigable rivers; the Act of 1866 granting telegraph companies the right to construct and operate their lines along military and post roads, and the more recent Railway Rate Regulation Act.

In line with this legislation, Mr. Garfield, the Commissioner of Corporations, supported by the President, has recommended, and urged upon Congress, the desirability of legislation looking to the licensing of corporations engaged in interstate commerce. It must be said that primarily the recommendations of the Commissioner looked to the control of the corporations spawned by the lax corporation laws of several of the states—laws so framed that they assist the promoter and speculator rather than protect the legitimate investor. Nevertheless, such a scheme would eliminate many of the difficulties, as the plan could not be made effective without prohibiting directly or indirectly certain lines of state action which now result only in discrimination and retaliation. Commissioner Garfield in his report of December, 1904, does not undertake to indicate what prohibitions would be necessary in order to protect the holder of a Federal license to engage in interstate commerce. The scheme suggested certainly contains many meritorious features, and on the other hand is surrounded by many practical and legal difficulties, which must be met in its actual development. But whether the scheme of a federal license for corporations engaged in interstate commerce is workable or not, it would seem that valid laws could be enacted along the principles presented by the Railroad Act of 1866

and the so-called Wilson Act of 1890 which would afford protection to the corporations engaged in interstate commerce, and at the same time relieve them from the burdens now imposed by the conflicting acts of the many states and territories. The Railroad Act of 1866 is affirmative and progressive in its nature, abolishing state lines as it were and permitting and promoting the formation of continuous lines of transportation. The Wilson Act is negative in its character, by determining the point at which a transaction shall cease to be interstate commerce and become the internal commerce of the state; both acts preserve the rights of the states and at the same time dispose of the unseemly conflict theretofore existing. Under such a statute the right of a corporation to make contracts out of the state creating it,—its interstate commercial transactions, could be preserved, and at the same time a uniform system of requirements could be provided under which citizens of the several states might be informed of the financial responsibility and legal character of the foreign corporations with whom they deal, and due service of process might be had within the bounds of each state. Such regulations would of necessity restrict the powers now exercised by the states, but at the same time corporations now engaged in interstate commerce would within certain limits be subjected to state laws. Necessarily such regulations could not directly interfere with the internal commerce of the states.

The matter to be adjusted is fraught with many and grave difficulties, owing to our dual system of sovereignty; that it must soon be met is every day becoming more apparent. In its final determination the courts—the bench and the bar—will have a delicate duty to perform. A duty we have every reason to believe will be ably and honorably performed.

FRANK E. ROBSON.

DETROIT, MICHIGAN.